

After reviewing the whole record and hearing the arguments of the parties, the Appeals Board finds as follows:

In a settlement hearing held on May 5, 1992, the claimant and respondent settled claimant's workers compensation claim for an accidental injury occurring on November 13, 1991. The respondent had previously paid temporary total disability benefits of \$5,696.19 and medical and hospital expenses of \$8,612.08. The respondent and the claimant settled the issue of permanent partial general disability in the amount of \$11,859.29 and up to \$350 was paid for unauthorized medical expense. Respondent implied the Fund and all issues between the Fund and the respondent were reserved for future determination.

After the issue of Fund liability was submitted to the Administrative Law Judge, he assessed all of the liability for the costs and benefits paid in this matter to the Fund in an Award dated April 22, 1994. From that Award, the Fund appeals arguing that claimant did not suffer from a work-related accident that caused injury to his back and neck. The Fund further contends that the respondent did not have knowledge of the claimant's pre-existing condition. The Fund goes on to allege that Dr. Schlachter and Dr. Odulio who testified in this case failed to prove that the claimant's resulting disability would not have occurred but for his pre-existing condition or contributed to the resulting disability.

On the date of claimant's alleged injury, November 13, 1991, claimant was a self-employed, over-the-road truck driver doing business as Circle L. He hauled various refrigerated goods out of the Wichita area to Texas, Louisiana and California. Prior to the November 1991 incident, the claimant had suffered a previous work-related accident in March 1989. He broke his right ankle when he slipped off the back of his trailer and fell to the pavement. Claimant did not receive treatment for any injuries other than to his right ankle. However, after the March 1989 incident, the claimant testified that he started having increasing neck pain, stiffness and severe headaches. He attempted to control the headaches with nonprescription medication and chiropractic treatment. As the neck symptoms and headaches increased, he finally sought treatment in his hometown of Arkansas City, Kansas, with Dr. Schmeidler on November 13, 1991. Claimant was then referred to Dr. Odulio in Wichita, Kansas, who placed him in an intensive physical therapy program.

Claimant established through his testimony that he was unable to do as much work now as he did in the past because of his present physical problems. He further testified that he used to load and unload his truck himself. However, since experiencing the increased symptoms in his neck and the severe headaches in November 1991, he has hired the loading and unloading done.

Perlita Odulio, M.D., board certified in physical medicine and rehabilitation, treated the claimant from December 2, 1991 until April 20, 1992. She diagnosed the claimant with cervical spondylosis or degenerative arthritis of the cervical spine. Dr. Odulio opined that the degenerative condition existed in the claimant's spine prior to November 1991. Dr. Odulio placed the claimant in physical therapy and biofeedback in an effort to control his pain. She released the claimant to return to work in April 1992 with permanent restrictions and a five to ten percent (5-10%) functional impairment rating based on the AMA Guides, Third Edition, Revised. However, Dr. Odulio did not offer an opinion within a reasonable degree of medical probability as to an apportionment of the five to ten percent (5-10%) permanent impairment rating between the claimant's pre-existing condition and the aggravation that occurred in November 1991.

At respondent's request, Ernest R. Schlachter, M.D., also testified in reference to what, if any, contribution claimant's pre-existing cervical condition may have had to his current injury and resulting impairment. Dr. Schlachter did not personally examine the claimant but had the benefit of medical records from previous treating physicians, Dr. Odulio, Dr. Hered, Dr. Pereira, Dr. Cellars, Dr. Marvel, Dr. Mangen, and Dr. Schmeidler, as well as the evidentiary deposition testimony of the claimant. Dr. Schlachter opined that claimant's pre-existing disc disease and spondylosis was gradually aggravated by his work

as an over-the-road truck driver and more likely than not was aggravated by the jarring in driving the truck. Dr. Schlachter went on to opine that the most recent episode was an aggravation of this pre-existing condition and claimant would not have suffered this injury or impairment, but for his pre-existing condition.

In order to shift liability to the Fund, the respondent has the burden to first prove that it knowingly employed or retained a handicapped employee. See K.S.A. 1991 Supp. 44-567(a). An employee is considered handicapped if he or she is afflicted with any impairment that would constitute a handicap in obtaining or retaining employment. See K.S.A. 44-566(b). If an employee's disability probably or most likely would not have occurred but for the pre-existing impairment, the respondent is fully relieved of liability. On the other hand, if the employee's resulting disability most likely would have been sustained without regard to the pre-existing impairment but the resulting disability was contributed to by such impairment, then the employer is partially relieved of liability. See K.S.A. 1991 Supp. 44-567(a)(1)(2).

In the instant case, the claimant, as a self-employed person, was both an employee and an employer. Miller v. Miller, 13 Kan. App. 2d 262, 768 P.2d 308 (1989). Accordingly, the claimant had knowledge of his pre-existing cervical spine condition which caused him to have neck pain, stiffness and headaches for several years prior to the exacerbation of his condition in November 1991. Even though claimant had returned to work as a truck driver, he had to curtail his work activities because of his continuing neck problems. For instance, claimant had to quit loading and unloading his trucks which required him to hire other people to perform this work activity.

The Appeals Board finds that the testimony of the claimant, coupled with the uncontradicted testimony of the physicians, firmly establishes that the self-employed claimant had knowledge that he had an impairment which constituted a handicap and he continued to drive his truck which resulted in permanent disability that would not have occurred but for his pre-existing cervical spine condition.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark, dated April 22, 1994, should be, and the same is hereby, affirmed and the Kansas Workers Compensation Fund is ordered to pay one hundred percent (100%) of all workers compensation benefits and costs accrued in this matter.

All other orders and findings of the Administrative Law Judge, in his Award of April 22, 1994, are herein adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of July 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Vaughn Burkholder, Wichita, KS
Michael T. Harris, Wichita, KS
John D. Clark, Administrative Law Judge
David A. Shufelt, Acting Director